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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

DOCKET NO.

77-1538

ALAN HERBERT ABRAHAMS, a/k/a
JAMES A. CARR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Review Judgment and Order of the United States Court of Appeals for the First Circuit

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1977

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UNITED STATES OF AMERICA,
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vs.

ALAN HERBERT ABRAHAMS a/k/a
JAMES A. CARR,
Petitioner.

Petition for Writ of Certiorari to Review Judgment and Order of the United States Court of Appeals for the First Circuit

---

The Petitioner, Alan H. Abrahams, respectfully prays that this Honorable Court issue a Writ of Certiorari to review Judgment and Order of the United States Court of Appeals for the First Circuit, rendered on April 19, 1978, which affirmed the District Court's denial of the defendant's petition for review of denial of bail and to set bail.

The petitioner had, in February 1978 moved the United States District Court for review of denial of bail, which motion was denied. On March 22, 1978, the petitioner appealed the decision of the District Court per Title 18, section 3147 of the United States Code.

This petition is respectfully submitted for a review of the Appeals Court's denial of bail. Serious questions of law are presented, necessitating this Court's consideration of the issues at bar.

JURISDICTION

The jurisdiction of the Court for review is founded in Title 18, Section 1254 of the United States Code and is thereby invoked.

QUESTIONS PRESENTED

1. Whether Title 18, Section 3146 of the United States Code mandates the release of the petitioner, before trial, in a non-capital offense.

2. Whether pretrial detention, being a contravention of Title 18, Section 3146 of the United States Code is in violation of the Eighth Amendment of the Constitution of the United States is a prohibition against cruel and unusual punishment.

STATUTES

3146. Release in noncapital cases prior to trial.—(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him

that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: Provided, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court. (June 22, 1966, P.L. 89-465, §3(a), 80 Stat. 214).

3147. Appeal from conditions of release.—(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly. (June 22, 1966, P.L. 89-465, §3(a), 80 Stat. 215).

3148. Release in capital cases or after conviction.—A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense

and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected. (June 22, 1966, P.L. 89-465, §3(a), 80 Stat. 215).

FACTS

On January 10, 1978, the petitioner was arrested on a warrant alleging contempt issuing from the United States District Court for the Western District for Michigan.

On the same date the petitioner was arraigned before United States Magistrate Pierce and admitted to bail of $100,000, and the bail was posted.

Subsequently, on January 18, 1978, the bail was revoked in an *ex parte* basis at the institution of a criminal prosecution alleging a violation of Title 18, Section 1001, United States Code (otherwise known as giving false statements to a magistrate).

The petitioner was apprehended on January 25, 1978, and arraigned on February 16, 1978, at which time Magistrate Cohen denied bail.

The petitioner, in detention since his section 1001 arraignment, moved the United States District Court for review of denial of bail. On March 6, 1978, an evidentiary hearing was held in support of that motion. Chief Justice Andrew Caffrey took the motion under advisement at that time. The Motion was denied on March 21, 1978 and the District Judge set forth the basis for this denial in a memorandum.

On March 22, 1978, the petitioner appealed the decision of the District Judge denying bail, notwithstanding the provisions of section 3146.

The Court of Appeals for the First Circuit considered the matter on a timely filed notice of appeal in accordance with the provisions of Title 18 section 3147 United States Code, regarding appellate review.

The Order and Judgment of the District Court was affirmed on April 19, 1978, by the Appeals Court in a ten page decision.

REASONS FOR GRANTING THE WRIT

Point I

Title 18 section 3146 of the United States Code is a mandate for release, before trial in non-capital cases, without regard to extreme or unusual circumstances.

The purpose of the Bail Reform Act of 1966 was to "revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained . . . when detention neither serves the needs of justice nor the public interest." (Section 2 of The Act of June 22, 1966.)

The origination of the right to bail was founded historically in the British Bill of Rights. *Carlson et al. v. Landon*, 342 U.S. 524, 545, 546 (1952). See also; Development of History of Bail, Meyer, Constitutionality of Pretrial Detention, 60 Georgetown Law Journal 1140 (1972).

The drafters of the United States Constitution, painfully aware of the abuses of bail practices, saw fit in their wisdom to provide for a standard of reasonable bail in the Eighth Amendment.

In spite of a constitutionally protected right to bail, abuses in bail system developed. Congress enacted in 1966, the Bail Reform Act to alleviate those abuses, which included profiteering among bail bondsmen and excessive bail requirements as a spur to further criminal activity. (*United States v. Kirkman*, 426 F.2d 747 (1970 CA 4)).

Section 3146 is a directive for the release of defendants under one of two conditions:

(1) unsecured appearance bond, or

(2) any one or a combination of five conditions of release provided for in 3146(a)(1-5), including bail in either cash or surety.

"The spirit of the Bail Reform Act is to favor non-financial forms of bail . . ." *United States v. Melville*, 309 F. Supp. 824 (1970 D.C.N.Y.).

It is clear, then, that the legislative intent was not to permit pretrial detention when one views in *pari matria* section 3146 (pretrial release) and section 3148 (post-trial release or release in capital offenses).

Further, the petitioner contends that section 3146 does not provide for discretion in denying bail in those cases which come within the perimeters of section 3146. The language of section 3146 is mandatory rather than permissive with the use of "shall." [1]

In application of this section, the District Court and the Appeals Court, in affirmation, relied upon two factors:

(1) That the petitioner had filed after bail was set in previous cases.

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1. "Shall" as used in statutes, contracts or the like is a word mandatory or imperative. *McDunn v. Roundy*, 191 Iowa 976, 181 N.W. 453; *United States v. Two Hundred Sixty Seven Twenty Dollar Gold Pieces*, 255 Fed. 217 (D.C. Wash.).

For a thorough and complete review of construction and application of provisions of 18 U.S.C. 3146 governing pretrial release or bail of persons charged with non-capital offenses, see 8 A.L.R. Fed. 586.

In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. *People v. O'Rourke*, 124 Cal. App. 752, 13 P.2d 989, 992.

(2) That the petitioner had forfeited his bail in a separate matter in the same District Court.

The petitioner contends that the legislative intent of the Bail Reform Act, the weight of authority and the construction of the statute do not provide for the denial of bail, even in cases where there is evidence of previous default:

> "The Court has no discretion to refuse bail altogether in non-capital cases even though the accused was shown to have absconded after bail in previous cases) (Rowan v. Randolph, 268 F. 527 (CCA 7th).

In addition, the matter of bail must be independently considered for each offense:

> "Flight and forfeiture on one charge pending before a court does not deprive the defendant of his right to bail on another and different accusation" (In Re Lammar, 294 F. 688).

In a number of decisions, courts have held that the seriousness and nature of the charge, the likelihood of sentence, the number of pending charges are not sufficient nor proper basis for denial of bail, however relevant in imposing conditions for release. (*United States v. Cook* (1970) 143 App. D.C. 1, 442 F.2d 723, *United States v. Alston* (1969 App. D.C.) 420 F.2d 176; *United States v. Edson*, 487 F.2d 370 (1st Cir. 1973); *United States v. Bobrow*, 468 F.2d 124 (D.C. Cir. 1972)).

The instant case is clearly distinguishable from *United States v. Wind*, 527 F.2d 672 (6th Cir. 1975), in that in *Wind*, (a) the bail was revoked *during* trial and (b) the revocation was founded in a belief that the defendant was

possessed of dangerous propensities. (See also *United States v. Gilbert* (1969, App. D.C.) 425 F.2d 490).

The petitioner contends that a distinction may reasonably be made between those cases which have denied bail on the basis of danger to witnesses and those cases which have reviewed the conditions which may be imposed upon release.

The petitioner lastly contends that he has a constitutionally protected right to bail (8th Amendment), a right which the Congress has seen the necessity of establishing in detail by statutory enactment. (*United States v. Leathers*, 412 F.2d 169, 170 (D.C. Cir. 1969).

Point II

Denial of bail in the instant case was cruel and unusual punishment in contravention of the eighth amendment of the United States Constitution.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

What constitutes cruel and unusual punishment has not been exactly decided. *Weems v. United States*, 217 U.S. 126, 30 S. Ct. 544 (1910). The words of the eighth amendment prohibition against cruel and unusual punishment are not precise; their meaning has not been detailed by this Court. In addition, whether the word unusual has a qualitative meaning which is different from cruel, is not clear. This Court has held however that, if the word unusual is to have a different meaning from the word

cruel, such meaning should be an ordinary one, signifying something different from that which is generally done. *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590 (1958).

In the case *sub judice*, since 18 U.S.C. section 3146 sets forth, in mandatory language, the standard relative to pre-trial detention, any deviation from that standard, mandatory in nature, resulting in excessive compulsory pre-trial detention is a constitutionally impermissive judicial action.

Even though the judicial or penal conduct is applied in pursuit of a legitimate penal aim, it may be constitutionally prohibited if it goes beyond what is necessary to achieve those aims. *Dearman v. Woodson*, 429 F.2d 1288 (C.A. 10th Cir., 1970).

In the case at bar, the actions of the courts below, in refusing to set conditions of release pursuant to Title 18, section 3146, exceed what was necessary to achieve valid penal or societal aims. The petitioner's Eighth Amendment rights were therefore violated where the actions of the lower courts imposed cruel and unusual punishment in the denial of bail.

The general rule that this petitioner, as any other accused, is presumed to be innocent, prevails even through bail proceedings.

The petitioner has been custodially detained since January 25, 1978. He contends that he has been denied the opportunity to comply with a reasonable set of conditions for release.

This delay and the fact of detention necessitates the speedy resolution of these issues, and a prompt disposition of the matter of bail now pending in this petition.

Respectfully submitted,

/s/ Harvey Brower
HARVEY BROWER

/s/ E. John Wherry, Jr.
E. JOHN WHERRY, JR.

/s/ Fletcher N. Baldwin
FLETCHER N. BALDWIN

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CR. NO. 78-4-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALAN HERBERT ABRAHAMS,
a/k/a James A. Carr,
Defendant.

MEMORANDUM
March 21, 1978

CAFFREY, Ch. J.

This matter came before the Court on the basis of defendant's motion to be admitted to bail. After an evidentiary hearing at which defendant waived by counsel his right to be present and called six witnesses, I find and rule as follows:

Defendant Alan H. Abrahams, a/k/a James A. Carr, is presently under a one-count indictment in this Court for violation of 18 U.S.C.A. §1001. He also presently under a charge of escaping from a state penal institution in New Jersey, where he was serving a sentence of four to six years. He is under the charge of probation violation in the United States District Court for the Southern District of New York, and, finally, he is under a criminal contempt of court charge in the United States District Court for the Western District of Michigan. At the hearing, counsel for defendant conceded that Abrahams is currently being held without

bail in connection with the charges pending in all three Federal District Courts.

During the course of the hearing, it was established by testimony which I believe, or alternatively by concessions of counsel, that Abrahams in fact did flee the state penal farm in New Jersey while serving a sentence and was without authority to do so. It was further established that, despite having posted $100,000 bail after a United States Magistrate's hearing in this Court in January, 1978, defendant later failed to appear as directed by the Magistrate. Additionally, defense counsel stated that when Abrahams was arrested by the FBI in Florida on January 25, 1978, he was registered at a resort hotel under the name Barrett. Defendant's 18-year-old daughter, Laurie Abrahams, testified that she was with her father at the time of the Florida arrest, and that his hair then was tinted a different color from its normal shade. The fact that Abrahams' family accompanied him to Florida is consistent with an established pattern, more fully described below, of leaving no family members behind who could help locate the defendant upon inquiry by law enforcement authorities.

Miss Abrahams also testified that she and her sister Allison have been living with their father for approximately the last 2½ years, and that during that time the home was shared by a woman named Lynn Heinsius. Laurie Abrahams testified that from about December, 1974 to December, 1975, defendant, his two daughters, and Lynn Heinsius lived as a family unit in Montreal, Canada, where all four of them used the surname Wayne Laurie testified that when the Canadian authorities began to inquire about possible deportation of defendant, the group moved to the Bahamas where they used the family name Abrahams. After a short time in the Bahamas, they next moved to Santa Monica, California, where they used the family

name Layne, the name under which Laurie attended school in Santa Monica.

Criminal charges were brought against defendant in California, but Laurie expressed the belief that these charges were straightened out before they left California. In any event, the group then moved to the Boston area, where Lynn Heinsius, almost on the day of arrival, gave birth to a girl in a Boston hospital using the family name Conley (or Conlee). After this birth, the surname Carr was used by the five members of the group. Laurie and her sister Allison attended various schools in New England under the family name Carr. Defendant most recently did business under the name James A. Carr, as President of Lloyd, Carr & Co., a commodity options brokerage firm.

Several former employees of Lloyd, Carr & Co. testified that the firm has been under intense investigation by various public regulatory agencies for approximately the last fourteen months. The testimony of James A. Brien, former Vice President of Lloyd, Carr & Co., was of little probative value on the issues to be resolved herein. He testified that his employment with the Carr commodity options brokerage began in November, 1976, that the business had substantial problems, and that he was never told by defendant to take action to "wind down" the business, up to and including January 10, 1978, the day on which both Brien and defendant were arrested by the FBI. All that Brien was told by Abrahams prior to defendant's travel to Florida was that defendant intended to go away for a few days to avoid publicity. Brien impressed me as a singularly unreliable witness. Although conceding he was a college graduate, Brien denied knowing that apprehension, transportation to a police station, booking, and fingerprinting constitute being arrested, denied understanding

the distinction between an arrest and a conviction, and only grudgingly admitted on cross-examination that he had been convicted in a District Court of the Commonwealth and now has an appeal therefrom pending in Middlesex Superior Court. He stated that at the arraignment he had told the Magistrate that he had never been arrested or convicted; on cross-examination, he conceded that neither of those answers to the Magistrate was the truth. In sum, I give no weight to Brien's testimony because I have extreme reservations as to his truthfulness.

Ralph R. Zolla, former trading-floor manager for Lloyd, Carr & Co., likewise testified that, after the posting of the bail set by the Boston Magistrate, and prior to Abrahams' flight to Florida, he never was informed of any plans of defendant to flee the jurisdiction or discontinue the brokerage business. Zolla admitted on cross-examination that he was convicted of assault and battery on a photographer, who was apparently attempting to take a photograph of defendant Abrahams in the brokerage office in December, 1977.

I find that the testimony of the employees of Lloyd, Carr & Co. was not probative of any facts relative to the issues to be decided on a motion to admit a defendant to bail. The common denominator in their testimony was a strong loyalty to defendant, despite the demise of Lloyd, Carr & Co., and the various legal problems, civil and criminal, presently confronting him and his firm. It is obvious that none of the employees was taken into Carr's confidence.

Charles Evans, who described himself as a chauffeur-caretaker for defendant, stated that he was hired by Abrahams on November 11, 1977 as a resident chauffeur-housekeeper-handyman. He still lives in defendant's former home

at 201 Ocean Avenue, Marblehead. Evans testified that he has not received any salary from defendant since January 6, 1978, but is firmly confident that he will be paid in the future. His testimony, in substance, was that Abrahams, prior to departing Boston for Florida, never told him that he was planning anything more than a couple of days of vacation. I rule that Evans' testimony, like that of Brien and Zolla, is of no probative value on the question of defendant's likelihood to respond to court orders and to appear if bailed, particularly since the testimony amounted only to the fact that Abrahams told Evans virtually nothing about his plans, intentions or private business.

In summary, I rule that the fact that defendant did not announce his plans in advance to witnesses Evans, Brien, and Zolla is no evidence at all of the thought processes of defendant's mind. It is enough to repeat the axiom that what a man does is often more probative of his state of mind than what he says or fails to say. While the testimony of these three witnesses does not establish that defendant intended to flee, it, more importantly, fails of its intended purpose to establish that defendant did not intend to flee. This leaves the record consisting primarily of the fact that defendant Abrahams' present status before the Court is that of a person who escaped from a New Jersey prison while serving a four to six year prison sentence, who, after posting $100,000 cash bail, defaulted on a scheduled appearance, and who is a person facing other criminal charges and a plethora of civil litigation.

Title 18 U.S.C.A. § 3146(a) provides that in setting bail in noncapital cases prior to trial, the Court shall:

> [O]rde[r] [the] releas[e] [of the defendant] pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount

specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

In view of the record of defendant's jail escape in New Jersey, his defaulting on a $100,000 cash bond in this Court, and his proclivity for living in different parts of this country, Canada and the Bahamas under multiple fictitious names,

as well as the pendency of revocation of probation proceedings and contempt proceedings against him in Federal District Courts in New York and Michigan, his serious legal problems with the State of New Jersey because of the jail escape, and his exposure to a maximum sentence in the instant case of a fine of not more than $10,000 and imprisonment for not more than five years, or both, I find and rule, in the exercise of my statutory discretion, that none of the five conditions spelled out in 18 U.S.C.A. § 3146(a), or any combination thereof, will reasonably assure the appearance of defendant for trial if admitted to bail. Consequently, the motion to establish bail is denied.

/s/ Andrew A. Caffrey
ANDREW A. CAFFREY,
Ch. J.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1131

UNITED STATES OF AMERICA,
Appellee,

vs.

ALAN HERBERT ABRAHAMS,
a/k/a JAMES A. CARR,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Harvey Brower on petition for bail and memorandum in support thereof, for appellant.

Edward F. Harrington, United States Attorney, and *Michael A. Collora*, Assistant United States Attorney, on memorandum in opposition thereto, for appellee.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

April 19, 1978

BOWNES, *Circuit Judge*. In this case we review an order of the district court denying bail to defendant pending trial. Defendant has been indicted on one count for violation of 18 U.S.C. § 1001, which carries a maximum sentence of five years and/or a fine of $10,000.

The facts leading up to the district court's order are significant. The defendant was arrested on January 10, 1978, outside his home in Marblehead, Massachusetts, pursuant to a warrant issued by a federal judge of the Western District of Michigan. United States Magistrate Pierce, after a preliminary hearing at which defendant and his counsel were present, fixed bail at $100,000 surety bond and set January 18, 1978, as the date for the removal hearing pursuant to Fed.R.Crim.P. 40(b). Defendant posted bail and was released. He failed to appear on January 18, 1978, for the removal hearing. He was arrested on January 25, 1978, in Tarpon Springs, Florida, registered at a motel under the name of "Barrett."

Defendant was arraigned on February 16, 1978, before United States Magistrate Cohen on the charge of violation of 18 U.S.C. § 1001. At the arraignment, the government took the position that the defendant should be held without bail and brought the following facts, none of which were contested, to the magistrate's attention:

(1) Defendant had three previous convictions in both federal and state courts.

(2) Defendant was an escaped state prisoner from New Jersey.

(3) Defendant had given false information at the previous bail hearing on January 10, 1978; he falsely stated his name was Carr and denied that he had ever previously been arrested or convicted of a crime.

(4) Defendant had failed to appear on January 18, 1978, as ordered by Magistrate Pierce.

(5) Defendant, using the name Layne, had failed to appear in a California case and was a fugitive from the courts of that state.

(6) Defendant had used several aliases in the past.

(7) Defendant had transferred 1.5 million dollars to Bermuda in 1976 and 1977.

Magistrate Cohen ordered defendant held without bail finding: "His past record suggests to me that if given the opportunity he would flee. The risk of flight is immeasurable in this case . . . ."

Defendant then brought a motion in the district court asking that he be admitted to bail.[1] 18 U.S.C. § 3147.

The district court held an evidentiary hearing at which defendant, through his counsel, waived his right to be present. Six witnesses were called on defendant's behalf. The district judge in his comprehensive opinion made specific findings. He noted that the defendant is at the present time facing a plethora of criminal charges: escape from a New Jersey penal institution, probation violation in the United States District Court for the Southern District of New York, criminal contempt in the United States District Court for the Western District of Michigan, and the one pending in the District of Massachusetts. Counsel for defendant conceded at the hearing that defendant was being held without bail in connection with the charges in the Southern District of New York and Western Michigan. The district judge was not impressed either by the testimony of defendant's witnesses or their credibility. He was impressed by the past record of defendant's acts and deeds. After setting forth the requirements of 18 U.S.C. § 3146(a), the district court found:

> In view of the record of defendant's jail escape in New Jersey, his defaulting on a $100,000 cash bond in this

1. It is immaterial now that the defendant did not follow the procedure required under 18 U.S.C. § 3146(d).

> Court, and his proclivity for living in different parts of this country, Canada and the Bahamas under multiple fictitious names, as well as the pendency of revocation of probation proceedings and contempt proceedings against him in Federal District Courts in New York and Michigan, his serious legal problems with the State of New Jersey because of the jail escape, and his exposure to a maximum sentence in the instant case of a fine of not more than $10,000 and imprisonment for not more than five years, or both, I find and rule, in the exercise of my statutory discretion, that none of the five conditions spelled out in 18 U.S.C.A. § 3146(a), or any combination thereof, will reasonably assure the appearance of defendant for trial if admitted to bail. Consequently, the motion to establish bail is denied.

The facts before us are the findings of the district court and the factors considered by Magistrate Cohen. We agree with the district judge that defendant's past record and his life style, *i.e.*, the frequent use of aliases with no permanent residence, would lead a reasonable man to predict that bail would not result in his appearance at trial.[2] In addition, there is the uncontradicted assertion by the government that defendant has transferred $1,500,000 to Bermuda. All signs point to flight as soon as possible to avoid prosecution.

The issue then, which is one of first impression as far as we can determine, it whether, under these circumstances, defendant is entitled to bail as a matter of right prior to trial.

Our inquiry starts first with the Constitution. The eighth amendment proscribes excessive bail, but it does not mandate that a defendant be allowed bail in all cases. In *Carl-*

2. Bail in an unreasonable and excessive amount is, of course, tantamount to the denial of any bail.

son, et al. v. Landon, 342 U.S. 524, 545-546 (1952), the Supreme Court held:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

Carlson was decided subsequent to *Stack v. Boyle*, 342 U.S. 1 (1951), in which the Court held that bail had not been fixed by proper methods. During the course of its opinion, the Court stated:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. *Id. at* 4.

Rule 46(a) now reads as follows:

> Eligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3146, § 3148, or § 3149.

We, therefore, turn to 18 U.S.C. § 3146(a) and (b).[3]

3. (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

The statute clearly carries a strong presumption in favor of releasing a defendant on his personal recognizance or an unsecured appearance bond. Bail is one of the least preferred methods for assuring the defendant's appearance at trial. This is in contrast to 18 U.S.C. § 3148 relating to capital cases and post conviction release which expressly provides for detention if flight or danger to any other person or the community exists.[4] 18 U.S.C. § 3146,

4. 18 U.S.C. § 3148:

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or post a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

however, does not state anywhere that a defendant has an absolute right to bail pending trial. The statute is keyed to assuring the appearance of the defendant at trial. Paragraph 5 of section (a) provides that the judicial officer may "impose any other condition deemed reasonably necessary to assure appearance as required, ..."

In our review of the cases that have considered similar and related questions under the statute, we have been unable to find one that holds directly that a defendant has an absolute right to bail pending trial regardless of the circumstances. In *United States v. Wind*, 527 F.2d 672 (6th Cir. 1975), the defendant had stated he would post a million dollar bond, would flee and no one would testify against him. The court held, citing *United States v. Gilbert*, 425 F.2d 490 (D.C. Cir. 1969), that the trial court had the inherent power to revoke defendant's bail during trial. In *Gilbert*, the court said: "We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial." *Id.* at 491-492. *Wind* was held inapplicable by the same circuit in a subsequent case in which it reversed a pretrial no bail detention order against a defendant charged with mailing a letter threatening the life of the President. The court noted: "The appellant in the present case has neither threatened witnesses nor, on the record before us, taken any steps or made any threats that would hazard an orderly trial on the date now scheduled, November 17, 1976." *United States v. Bigelow*, 544 F.2d 904, 908 (6th Cir. 1976).

The Second Circuit in *Gavino v. MacMahon*, 499 F.2d 1191, 1195 (2d Cir. 1974), used the following language in setting aside a no bail pretrial detention order:

> The Bail Reform Act, 18 U.S.C. § 3146, et seq., like its predecessor, Rule 46(a)(1), F.R.Cr.P., guarantees that in a noncapital case the defendant will have the pretrial right to release on bail except *in extreme and unusual circumstances*, e.g., where threats to a government witness would jeopardize the court's own processes. . . . (emphasis ours)

In the course of its opinion, the court referred to an earlier case, *United States v. Bentvena*, 288 F.2d 442, 444 (2d Cir. 1961), in which it had stated: "Thus, until trial commences, enlargement on bail is the rule, *upon adequate assurance that the accused will appear at trial.*" (emphasis ours)

This Circuit in *United States v. Edson*, 487 F.2d 370 (1st Cir. 1973), set aside as excessive a $25,000 surety bond and held that the government had not met its burden of "showing that defendant would violate any bail order that we presently imposed." *Id.* at 372. We stated in considering the Bail Reform Act:

> Until a defendant has been convicted, the nature of the offense, as well as the evidence of guilt, is to be considered only in terms of the likelihood of his making himself unavailable for trial. Determination of what is needed "reasonably [to] assure" defendant's appearance, not considerations of state comity, controls the setting of bail under the Bail Reform Act. *Id.* at 372.

The District of Columbia Circuit has come close to holding that bail is an absolute right prior to trial, but it has not yet, at least, taken that position. In *United States v. Leathers*, 412 F.2d 169, 170 (D.C. Cir. 1969), the court stated: "The Bail Reform Act specifies mandatorily that conditions of pretrial release be set for defendants accused of noncapital offenses." Its holding, however, was narrow and restricted:

> Because we find that in the two cases before us sufficient attention has not been given toward fashioning programs of release based upon nonfinancial restrictions rather than unreachable money bonds, we remand these cases to the District Court for consideration of those minimal nonfinancial conditions of release which will "*assure the appearance of the person as required.*" (emphasis ours) *Id.* at 173.

In *United States v. Bobrow*, 468 F.2d 124 (D.C. Cir. 1972), the court weighed carefully the risk of defendant's flight before trial in setting aside the district court's order of detention without bail and reinstating the magistrate's order of the postng of a $100,000 surety bond. In *United States v. Cook*, 442 F.2d 723 (D.C. Cir. 1970), the court in remanding for consideration of a $100,000 surety bond stated:

> Clearly the magnitude of the offenses and appellant's loose ties to the community call for a very substantial bond, but we feel that the court that decides this matter is entitled to consider appellant's suggestion on the size of the bond. *We realize that this may well prove in the judgment of the trial court to be an insufficient amount in view of the severity of the offense in which event appellant will be confined until trial.* (emphasis ours) *Id.* at 725.

The Eighth Circuit has held that there is no absolute right to release on bail prior to or during trial. *United States v. Kirk*, 534 F.2d 1262, 1281 (8th Cir. 1976), citing *United States v. Smith*, 444 F.2d 61 (8th Cir. 1971). The reasoning in *Smith* is instructive.

> Rule 9, FRAP, recognizes that bail may be refused under appropriate circumstances by authorizing an appeal from either a refusal of bail or from conditions imposed that prove onerous to the defendant. The district court in such cases must state in writing the reasons for refusing bail or for imposing conditions of release. The right to bail is thus not absolute but decisionally recognized and statutorily approved as being generally available in noncapital cases subject to denial in exceptional cases and subject to the imposition of reasonable conditions of release. Bail may be denied in the exceptional case. *Id.* at 62.

The situation here fits almost exactly the example stated by Judge Frankel in *United States v. Melville*, 306 F. Supp. 124, 127 (S.D. N.Y. 1969):

> While the statute, § 3146(a), does not say this in so many words, it has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance for trial. To state the extreme case, which is not a hypothetical, the strong presumption favoring release may disappear for a defendant charged with a grave offense, with powerful evidence against him, who lacks family ties or employment or resources or any roots in the community, and is possessed of a poor record for fidelity to court engagements. Such a defendant may have to stay in jail pending a trial to be brought on with utmost possible speed.

The record before us depicts a man who has lived a life of subterfuge, deceit and cunning. He is an escaped felon. He did not hesitate to flee to Florida and forfeit $100,000 to avoid the removal hearing. There is nothing in the record that suggests that bail will result in his appearance at trial. Every indication is to the contrary. This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail.

The order of the district court is affirmed.

NOTICE OF MOTION

TO: Edward F. Harrington, U.S. Attorney
1107 John W. McCormack Post Office and Court House
Boston, Massachusetts 02109

Please take notice that the undersigned attorneys for the Defendant-Appellant hereby make application on an emergent basis to the Hon. William F. Brennan, Associate Justice of the Supreme Court of the United States, for the setting of bail in the above-captioned matter, pursuant to 18 U.S.C. S. 1346 and in accordance with Rule 35.

/s/
HARVEY BROWER
Attorney-at-Law
Commonwealth of Massachusetts
Admitted to Practice to
Supreme Court of U.S.

/s/ E. John Wherry, Jr.
E. JOHN WHERRY, JR.
Attorney-at-Law
State of New Jersey
Admitted to Practice to
Supreme Court of U.S.

/s/ Fletcher N. Baldwin
FLETCHER N. BALDWIN
Attorneys-at-Law
State of Georgia
Admitted to Practice to
Supreme Court of U.S.

NOTICE OF APPEAL

TO: Clerk, United States Court of Appeals
For the First Circuit
1606 John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Edward F. Harrington, U.S. Attorney
1107 John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Please take notice that the undersigned attorneys for the Defendant-Appellant hereby appeal a decision of the United States Court of Appeals for the First Circuit rendered April 19, 1978 in its entirety, a copy of which is annexed hereto.

/s/
HARVEY BROWER
Attorney-at-Law
Commonwealth of Massachusetts
Admitted to Practice to
Supreme Court of U.S.

/s/ E. John Wherry, Jr.
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